

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CRYSTAL A. NICHOLSON	:	ORDER
	:	DTA NO. 818695
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Income Taxes under	:	
Article 22 of the Tax Law and the New York City	:	
Administrative Code for the Years 1997 and 1998.	:	

Petitioner, Crystal A Nicholson, 411 East 71st Street, New York, New York 10021-4838, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1997 and 1998.

A small claims hearing was scheduled before Presiding Officer Thomas C. Sacca at the offices of the Division of Tax Appeals, New York State Housing Finance Agency, 641 Lexington Avenue, New York, New York on Thursday March 28, 2002 at 9:15 A.M. Petitioner failed to appear and a default determination was duly issued. Petitioner has made a written request dated July 5, 2002 that the default determination be vacated. On July 29, 2002, the Division of Taxation filed a response in opposition to petitioner's application to vacate the default.

Petitioner, Crystal A. Nicholson, appeared on her own behalf. On September 6, 2002, the Division of Tax Appeals received from petitioner a power of attorney form authorizing Mr. Garry: Webb: Bey to represent her in this matter. Mr. Bey has not requested or received special permission to represent petitioner as provided by section 3000.2(b) of the Rules of Practice and

Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.2[b]) and it does not appear that Mr. Bey is otherwise qualified to appear on petitioner's behalf. The Division of Taxation appeared by Barbara G. Billet, Esq. (Jennifer A. Murphy, Esq.).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On June 15, 2001, the Division of Tax Appeals received a petition from Ms. Crystal Nicholson protesting an income execution which had been served on petitioner's employer. Petitioner complained that she had never been told the factual basis of the assessment, had not been granted a conciliation conference and had been denied due process of law because the Commissioner of Taxation and Finance had never instituted a court proceeding, never obtained a court judgment, never advised her of her administrative rights, never advised her of her right to a prompt hearing and never advised her of the facts the Department of Taxation and Finance relied upon in issuing the warrant.

2. In its answer, the Division of Taxation asserted that notices of deficiency (Notice Nos. L-016987210 and L-016987211, dated December 2, 1999) were issued to petitioner because she claimed the foreign earned income exclusion although domiciled in New York. The answer asserts that petitioner's Request for Conciliation Conference was not mailed until February 8, 2001 and that the Bureau of Conciliation and Mediation Services issued a Conciliation Order Dismissing Request (CMS# 185088) to petitioner on March 2, 2001.

3. On November 2, 2001, the Bureau of Conciliation and Mediation Services "(BCMS)" advised the Division of Tax Appeals that it had rescinded the Conciliation Order Dismissing

Request. On November 13, 2001, the Division of Tax Appeals advised petitioner that she would be scheduled for a conciliation conference in BCMS and requested that she sign a Stipulation for Discontinuance of Proceeding form withdrawing her petition at the Division of Tax Appeals with the condition that if this matter was not resolved at conference, petitioner would be allowed to file a new petition. Petitioner was advised that if she did not signed the petition, a timeliness hearing would be scheduled for her in the Division of Tax Appeals and if she did not appear for her hearing, she could be defaulted. Petitioner never signed the stipulation. On February 15, 2002, the Division of Taxation sent petitioner a second Stipulation for Discontinuance of Proceeding form. Again, petitioner failed to sign and return the form. On February 19, 2002, the calendar clerk of the Division of Tax Appeals sent a Notice of Small Claims Hearing to petitioner and to the Division of Taxation advising them that a hearing had been scheduled for them on March 28, 2002.

4. On March 28, 2002 at 9:15 A.M., Presiding Officer Thomas C. Sacca called the ***Matter of Crystal A. Nicholson***, involving the petition here at issue. Present was the representative for the Division of Taxation. Petitioner did not appear and no representative appeared on her behalf. The representative for the Division of Taxation moved that petitioner be held in default. On May 2, 2002, Presiding Officer Sacca issued a determination finding petitioner in default.

5. On June 20, 2002 the Division of Tax Appeals received a petition from Crystal A. Nicholson protesting the same assessments protested in her first petition as well as the March 15, 2002 Conciliation Order sustaining said assessments. On June 26, 2002, Frank Landers of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals returned the petition to petitioner explaining that she had already received a default determination in this matter. He went on to explain the process whereby petitioner could seek to have the default determination

vacated. By letter dated July 5, 2002, petitioner requested that the default determination of May 2, 2002 be vacated. In this request, petitioner stated:

I originally filed for and was granted an Appeal Hearing in April or May of 2001. Upon being notified of this, The Department of Taxation and Finance decided to grant me a Conciliation and Mediation Hearing, in lieu of the Appeal, which was subsequently scheduled for February 05, 2002.

Apparently they never informed the Division of Tax Appeals of this fact because I received a letter informing me of the date of the Appeal Hearing anyway. When I received it I knew that it was in error because I still had not yet to receive the Conciliation Order.

On February 15, 2002 The Department of Taxation and Finance sent me a Stipulation for Discontinuance of Proceeding form but I failed to return it to them. I guess this is what caused the confusion with your division.

6. In her letter of July 5, 2002, petitioner does not address the merits of her case.

7. By letter dated July 29, 2002, the Division of Taxation has opposed petitioner's request. The Division of Taxation asserts that petitioner has not established reasonable cause for her failure to appear for hearing and has not presented evidence of a meritorious case. The Division of Taxation states that:

In fact, petitioner concedes that she was sent a Stipulation of Discontinuance of Proceeding which she failed to sign and return. Such failure to sign and return caused the Small Claims Hearing to continue as scheduled. This outcome was explained to the petitioner in the cover letter accompanying the Stipulation (Exh. A). Petitioner knew that if the stipulation was not signed the hearing would occur, no reasonable cause exists.

As for a meritorious case, the petitioner claimed a Foreign Earned Income Exclusion for income earned at the Society of the New York Hospital (1997) and New York Presbyterian Hospital (1998) which are both located in New York City. Petitioner has shown no evidence that the wages were earned in a foreign country. Petitioner appears to live and work in New York City. The Division has grounds to ask for a frivolous petition penalty.

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, “In the event a party or the party’s representative does not appear at a scheduled hearing and an adjournment has not been granted, the presiding officer shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear.” (20 NYCRR 3000.13[d][2].) The rules further provide that: “Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case.” (20 NYCRR 3000.13[d][3].)

B. There is no doubt based upon the record presented in this matter that petitioner did not appear at the scheduled hearing or obtain an adjournment. Therefore, the presiding officer correctly granted the Division’s motion for default pursuant to 20 NYCRR 3000.13(d)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano’s Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioner to show a valid excuse for not attending the hearing and to show that she had a meritorious case (20 NYCRR 3000.13[d][3]; *see also, Matter of Zavalla, supra; Matter of Morano’s Jewelers of Fifth Avenue, supra*).

C. Petitioner’s explanation fails to establish a reasonable cause for her failure to appear at her hearing. She was advised on several occasions of the proper course to take to avoid the very difficulty in which she now finds herself. She acknowledges that her failure to do so led to the “confusion” with the Division of Tax Appeals. Nevertheless, I am convinced that petitioner, appearing *pro se*, did not comprehend the significance of a default and could be excused for her failure to appear. However, petitioner has utterly failed to establish a meritorious case. In fact she has failed to even address this issue in her request. It can be determined from a review of the

petitions that petitioner objects to what she perceives as denial of due process because the Division of Taxation never instituted court proceedings or obtained judicial approval for its warrant. However, this objection is without basis in light of the provisions of section 692 of the Tax Law which clearly authorizes the Division of Taxation to issue warrants for the collection of tax without first commencing a judicial proceeding. In any event, petitioner has failed to even attempt to explain how, as an individual living and working in New York City, she could qualify for the foreign earned income exclusion. Accordingly, I find that petitioner has not established a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued May 2, 2002 is sustained

DATED: Troy, New York
October 17, 2002

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE